IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1066

CITIZENS TO PRESERVE OVERTON PARK, INC., WILLIAM W. DEUPREE, SR., SUNSHINE K. SNYDER, SIERRA CLUB, and NATIONAL AUDUBON SOCIETY,

Petitioners,

v.

JOHN A. VOLPE, Secretary
Department of Transportation,
and
CHARLES W. SPEIGHT, Commissioner
Tennessee Department of Highways,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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January 19, 1971

Honorable E. Robert Seaver
Clerk, United States Supreme Court
Washington, D.C. 20543

Re: No. 1066, Citizens to Preserve Overton Park, Inc., et al. v. John A. Volpe, Secretary, Department of Transportation, et al.

Dear Mr. Seaver:

I have discovered that in the printed Brief for Petitioners in this case the printer omitted a portion of a sentence which was included in the typewritten brief filed on December 21, 1970. The words omitted, which should come immediately before the first line on page 9 of the printed brief, are:

> "Secretary, the final decision on the location was reached".

Thus the complete sentence which begins on the last line of page 8 and ends on page 9 should read:

> "By April, 1968 when, according to the Secretary, the final decision on the location was reached '[m]uch of the right of way leading to the park already ha[d] been purchased.' (A. 36)."

Would you please distribute copies of this letter to the Court.

Very truly yours,

John W. Vardaman, Jr.

cc: Honorable Erwin N. Griswold
J. Alan Hanover, Esq.

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OPINIONS BELOW

The opinion of the district court (A. 165-74)[1] is reported at 309 F. Supp. 1189. The opinion of the court of appeals (A. 177-94) and its order denying both rehearing and petitioners' application for stay A. 195-98 are unpublished.

JURISDICTION

The judgment of the court of appeals was entered November 17, 1970. (A. 198). This Court granted the petition

[1] "A." refers to the Appendix filed in this Court.

for a writ of certiorari on December 7, 1970. (A. 199). Jurisdiction of this Court to review the decision below rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Department of Transportation Act § 4(f), 49 U.S.C. § 1653(f) (Supp. III), 80 Stat. 933 which provides:

> "The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge or historic site resulting from such use."

and 49 U.S.C. § 1653(f) (Supp. V) (82 Stat. 823) amending 49 U.S.C. § 1653(f) (Supp. III) and 23 U.S.C. § 138 (Supp. V) (82 Stat. 823) which are identical and provide:

> "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which

requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

QUESTIONS PRESENTED

1. Whether the Secretary of Transportation sufficiently complied with 49 U.S.C. § 1653(f) and 23 U.S.C. § 138 in approving this highway without making any record of a determination that there are no feasible and prudent alternatives to the use of a public park and that the design includes all possible planning to minimize harm to the park?

2. Where the Secretary has not made a record of any determination under sections 1653(f) and 138, whether this Court's decision in *United States v. Morgan*, 313 U.S. 409 (1941), prohibits interrogation of a former Federal Highway Administrator to ascertain what determinations, if any, were made under those sections and the basis for any determinations?

3. Whether the courts below could properly review the Secretary's approval of this highway without reference to the full administrative record on which the Secretary acted, but rather on the basis of affidavits prepared for this litigation?

4. Whether the courts below were correct in holding that the petitioners were required to show that the Secretary's approval of this highway was arbitrary and capricious in order to obtain relief?

5. Whether the record contains disputed issues of material fact, relevant to a review of the Secretary's actions, which make the district court's grant of summary judgment for respondents erroneous?

STATEMENT

On November 5, 1969 the Secretary of Transportation announced final approval of a proposal to construct a six-lane interstate highway through Overton Park in Memphis, Tennessee. Promptly thereafter, petitioners (a Memphis conservation organization, two residents of Memphis, the Sierra Club and the National Audubon Society) filed this action seeking to enjoin construction of the highway on the ground that the Secretary had not complied with statutes designed to protect public park lands and recreation areas such as Overton Park. 49 U.S.C. (Supp. III) § 1653(f) and 23 U.S.C. (Supp. V) § 138. (A. 4-13). Those statutes require that public parks such as Overton Park not be used for federal-aid highways unless there is no "feasible and prudent alternative" and that, if the park is used, the design include "all possible planning to minimize harm" to the park.

Overton Park is a publicly owned 342-acre park. It is the outstanding park in Memphis and has been described as one of the most beautiful city parks in the country.[2] The park contains a zoo, a nine-hole municipal golf course, an outdoor theatre, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of oak-hickory climax forest. It was estimated by the zoo director that in 1967 approximately 1-1/2 million people visited the zoo. (A. 15).

The six-lane interstate highway will literally cut Overton Park in two. It will require a right-of-way varying between 250 and 450 feet through the entire width of the park, cutting a swath through a wooded area, passing immediately

[2] *See, e.g.*, A. MOWBERRY, ROAD TO RUIN, 36-37 (1969).

adjacent to a small, picturesque lake, then running along one side of the zoo. At least 26 centrally located acres of park land will be destroyed, and a far greater area will be affected. As presently designed, a substantial segment of the highway will be at or above ground level, exposing park users to the pollution, blight and din of vehicular traffic moving at high speeds. Department of the Interior officials have stated publicly that "Once the park has been separated by the expressway its values have been seriously impaired," and "Regardless of what type of surface design is followed there won't be much in the way of a wooded park left in Overton Park after an interstate highway is routed through it."[3] (A. 46, 50).

The general procedure followed by the states and the Department of Transportation in planning and approving federal-aid highways is for the state to select, preliminarily, the route location, which is then approved by the Secretary of Transportation. The state and the Secretary then determine the design of the highway. Before the state selects the route and the design, it is required by the Federal-Aid Highway Act and Department of Transportation Regulations to hold public hearings on the location and the design, and to submit the transcript of those hearings to the Secretary for his consideration in approving or rejecting the state's proposals. 23 U.S.C. § 128; 23 C.F.R., Chap. 1, pt. 1, App. A (1970). Once the design has been approved, the Secretary approves the "surveys, plans, specifications and estimates" and thereby obligates the United States to reimburse the state for up to 90 percent of the cost of the highway. 23 U.S.C. § 106.

It is apparently undisputed that the Secretary gave final approval under 23 U.S.C. § 106 to the highway through

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[3]Respondents imply that this six-lane interstate highway will have little or no effect on the park because it will follow the present route of a bus lane. They fail to point out, however, that the bus lane is a narrow, unobtrusive facility, approximately 25 feet wide, infrequently used and crossed freely by pedestrians. (A. 114).

Overton Park in November, 1969. The Secretary has argued that the location of the highway was finally determined in April, 1968. (Oral Argument on Stay Application). The facts relevant to that approval are as follows. By resolution of March 5, 1968, the Memphis City Council opposed location of the highway in the park. On April 3, 1968 then Federal Highway Administrator Bridwell met with the Memphis City Council. According to then Secretary of Transportation Boyd, Bridwell "told members of the Council that the Department of Transportation had no final decision on the location of the route." (A. 24) Bridwell said to the City Council:

> "'Yes there are alternatives. . . .'
>
> "We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly it was feasible. . . ." (A. 65)

Mr. Bridwell discussed an alternative that was located immediately north of the park and one located immediately south of the park. He then said "we left it completely in the hands of the city council to choose anything they wanted to choose. . . ."[4] On April 4 the City Council reversed its prior resolution and approved the route through the park. On April 19, 1968 the Department of Transportation concurred in that approval. During the argument before the district court, appellants specifically offered to prove through the deposition of Mr. Bridwell that he never determined that the alternative routes discussed with the City Council were not feasible and prudent. (A. 162)

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[4]The account of Mr. Bridwell's meeting with the Memphis City Council is taken from his testimony before the Subcommittee on Roads of the Senate Committee on Public Works concerning the planning of this highway. *Hearings on Urban Highway Planning, Location, and Design Before the Subcommittee on Roads of the Senate Committee on Public Works*, 90th Cong., 1st and 2d Sess., pt. 2, pp. 478-80 (1968). The relevant portions of his testimony are part of the record in this case. (A. 63-66).

The Secretary has attempted to justify the rejection of the alternatives described by Bridwell on the ground that they would displace a large number of people, some commercial establishments, churches and schools, and otherwise affect many individuals. (A. 27). In comparing the number of persons who would be affected by the various alternatives, however, respondents excluded any consideration of the millions of people who use Overton Park annually. Their calculations were restricted to the displacement of residences, commercial institutions, churches and schools. Even then, according to their own calculations, without consideration of the effect upon those who use the park, the present route will displace or affect more people than the alternative to the north of the park and nearly as many as that to the south.[5] Respondents offer no expla-

[5]The following tables contain respondents' calculations as to the effect of the route through the park and the alternatives to the north and south.

Original Line Through Overton Park

Residential Units	412 =	2292 people
Commercial & Industrial	30 =	295 people
Churches	4 =	20 (actually employed)
		5600 affected
Schools	None –	0
Total		2607 people

Line "B" (North)

Residential Units	428 =	1563 people
Commercial & Industrial	125 =	638 people
Churches	5 =	60 (actually employed)
		4000 affected
Schools	3 =	125 (actually employed)
Total		2386 people

Line "A" (South)

Residential Units	771 =	3065 people
Commercial & Industrial	46 =	1300 people
Churches	3 =	75 (actually employed)
		7500 affected
Schools	2 =	80 (actually employed)
		2000 affected
Hospitals & Homes for Aged	1 =	200 people
Total		4720 people (A. 69-70; 145-46)

nation why they chose the route through the park even though it displaced or adversely affected more people than the alternative to the north.

The alternatives suggested by Bridwell were not the only ones available. Petitioners submitted an affidavit of an expert in transportation planning who outlined two additional alternatives which the Secretary apparently never considered. (A. 92-98).

Although the alternative routes would be more costly than the route through the park, this does not appear to have been a factor in their rejection. (A. 27). In any event the costs of the alternatives are within the range of costs for interstate highways approved by the Secretary in other urban areas. (A. 79-80). The higher costs result from the fact that a right-of-way through a public park is generally cheaper than one requiring condemnation of residences or businesses—a factor which has led some to conclude that planners use parks as routes for highways because of their cheaper cost.[6]

In May, 1967, more than two years before the final approval of the segment of Interstate 40 that passes through the park, and more than a year before Bridwell's 1968 approval, the Department of Transportation authorized the state to begin acquiring the right-of-way leading to either side of the park.[7] By April, 1968 when, according to the

[6]The federal government is obligated to provide 90 percent of the cost of this highway and the funds are taken from the multibillion dollar Highway Trust Fund which may be used only for federal-aid highway projects. Highway Revenue Act of 1956 § 209, as amended, 23 U.S.C. § 120, *note* (1964) and (Supp. II 1967). Thus to the extent that money may be saved by using the present route and design, it means only that the Trust Fund has some additional funds to use for other federal-aid highway projects.

[7]The court of appeals was in error in stating that the right-of-way had been excavated to either edge of the park. The right-of-way has been cleared but there is no excavation or construction within 1.2 miles of the park on either side. Also the acquisition of right-of-way began in 1967 and was not, as the court of appeals stated, completed by 1967. (A. 28).

"[m]uch of the right of way leading to the park already ha[d] been purchased." (A. 36). The court of appeals held that this acquisition of right-of-way leading to the park rendered any alternative routes unreasonable and that respondents had thus presented a *fait accompli* which prevented judicial review of the Secretary's decisions with respect to alternative routes. *Compare Citizens Committee for the Hudson Valley v. Volpe*, 302 F. Supp. 1083, 1090 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir.), *cert. denied*, ___ U.S. ____ (December 7, 1970). However, the record is disputed on that point and the court of appeals erred in resolving that conflict since the case was on appeal from a summary judgment. The affidavit of petitioners' expert in transportation planning explained that the present state of right-of-way acquisition has not made consideration and selection of alternative routes inappropriate and that selection of an alternate would be beneficial. (A. 94-97). Furthermore since the right-of-way was acquired with knowledge (a) that there was no final approval of the route through the park, (b) that there was substantial controversy over that route and (c) that litigation was likely if it were approved, this should not immunize a decision of the Secretary of Transportation from judicial review.

The design was approved by the Secretary of Transportation in November, 1969. A substantial portion of the highway will be at or above ground level as it passes through the park. Although one segment will be slightly depressed, as it approaches a small creek slightly west of the park, the highway rises to 5-6 feet above ground level, and is thus exposed to those who use the park.

The Secretary rejected a number of alternative designs all of which are technologically possible and which would, according to officials of the Department of the Interior, minimize harm to the park. For instance, the highway could be placed in a bored tunnel, or a cut and cover tunnel–which is a fully depressed route covered after construction. It is conceded that the Overton Park area is favora-

ble for a cut and cover tunnel.[8] (A. 140). Another design which could have been selected was a fully depressed design covered in certain areas of the park. The Secretary apparently rejected this because in order for the small creek to drain under a depressed road, it would be necessary to install pumps or use a siphon. Both of these drainage devices, admittedly possible here (A. 123-24), are standard engineering techniques in common use throughout the United States today. (A. 76-77). The type of pump which would be required here has been used frequently to overcome similar drainage problems in the interstate highway system. The record contains no evidence as to the cost of a fully depressed, partially covered design.

Proceedings Below

Petitioners filed this action promptly after final federal approval was granted. (A. 4-13). Secretary Volpe filed a motion to dismiss. (A. 60). Pending a hearing on the motion to dismiss, he obtained a protective order which prevented petitioners from deposing former Federal Highway Administrator Bridwell and beginning discovery, pending decision on the motion to dismiss.[9] (A. 74). At the hear-

[8]These two types of tunnels were apparently rejected because of their estimated costs, $107,000,000 and $41,500,000; because the Secretary did not believe they would minimize harm to the park; and because of alleged safety problems. There is no evidence in the record to substantiate either the cost estimates or any alleged safety hazards. Indeed evidence documenting the use of tunnels in the interstate system disputes the Secretary's suggestions that tunnels are too hazardous or too costly. (A. 78-79). Furthermore his suggestion that a tunnel would not minimize harm to the park is disputed by the statements of the officials of the Department of the Interior.

[9]During the course of the hearing on the Secretary's motion for a protective order, petitioners agreed to withdraw the notice of deposition in order not to delay the hearing on the motion for preliminary injunction and the motion to dismiss. They did not consent to a protective order. There was no indication that the motion to dismiss would be converted to a motion for summary judgment on

ing of the motions to dismiss and preliminary injunction, respondents moved for summary judgment. The evidence in the district court consisted entirely of affidavits. The affidavit of Deputy Director Swick of the Bureau of Public Roads was submitted on behalf of respondent Volpe. It purported to prove that the Secretary had determined pursuant to sections 1653(f) and 138 that there were no prudent and feasible alternatives to the park route and that the design included all possible planning to minimize harm. (A. 27-32). However, Exhibits A, B and C, referred to as the basis of the purported proof, contained no such determinations but were in fact unauthenticated letters and press releases. (A. 33-38). The Secretary did not submit the entire "administrative record" for review. For instance he failed to submit reports which the Tennessee Department of Highways was required to file analyzing alternative routes and designs.[10] Petitioners submitted numerous affidavits which disputed most, if not all, of the factual assertions contained in the Swick affidavit.[11]

Despite the fact that petitioners had not been able to begin discovery, and despite the fact that the Secretary did not submit the entire "administrative record" on which he

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the day of the hearing and petitioners did not agree to postpone the deposition of Mr. Bridwell until after decision on a motion for summary judgment. The result of the protective order and the conversion, on the day of the hearing, of the motion to dismiss into a motion for summary judgment was that petitioners did not have an opportunity to take and offer the deposition.

[10]Paragraph 10.b(1) of the Bureau of Public Roads Policy and Procedure Memorandum 20-8, 23 C.F.R., Part I, Appendix A (1970) requires that when a state seeks approval for a route or design it must submit a report containing descriptions of "the alternatives considered and a discussion of the anticipated social, economic and environmental effects of the alternatives . . . ."

[11]As stated above, the motions for summary judgment were not made until the date set for hearing on the motions to dismiss and the motion for preliminary injunction. Petitioners' affidavits had been submitted in support of the motion for preliminary injunction.

had acted, the district court granted respondents' motions for summary judgment and dismissed the action. (A. 174).

The court found that the Secretary had made no written determinations with respect to alternative routes and designs under sections 1653(f) and 138, but held that the statutes did not require the Secretary to do so. It then held, on the basis of the affidavits, that it was undisputed that such determinations had been made, although not recorded, and, based on undisputed facts which it did not specify in its opinion, held that such determinations were not arbitrary and capricious. (A. 165-74). 309 F. Supp. 1189 (W.D. Tenn. 1970).

Petitioners appealed and by a vote of 2-1 the court of appeals affirmed. (A. 177-94). In affirming, the court of appeals held, over the dissent of Judge Celebrezze:

> (a) that even though the Secretary of Transportation was prohibited under sections 138 and 1653(f) from approving this project unless (1) there were no prudent and feasible alternatives and (2) unless the design included all possible planning to minimize harm to the park, and even though his approval was subject to judicial review, the Secretary complied with the statutes here despite the fact that he made no written findings or conclusions with respect to alternative routes or designs and produced no contemporaneous written evidence that he ever decided that there were no alternative routes or designs;
>
> (b) even though the only evidence that the Secretary made any determinations under sections 1653(f) and 138 was an affidavit prepared after the fact by Mr. Swick, a subordinate in the Department of Transportation, petitioners were not entitled to engage in discovery to ascertain whether, as claimed by Mr. Swick, such determinations were in fact made and to ascertain the bases, if any, for those determinations; and
>
> (c) that on the basis of affidavits before it, which were not the complete record on which the

> Secretary acted, the Secretary was entitled to summary judgment on the question of whether he made the determinations required under sections 1653(f) and 138 and whether those determinations were arbitrary and capricious.

Judge Celebrezze dissented on the grounds that (a) there were numerous issues of disputed fact; (b) the district court and the majority of the court of appeals erred in attempting to review the Secretary's decisions under sections 1653(f) and 138 without either requiring the Secretary to produce the full administrative record on which he had acted or permitting petitioners to obtain it by discovery and submit it to the court; (c) in order for the courts to review the Secretary's determinations, the Secretary must make written findings and conclusions which he did not do in this case and (d) that the proper scope of review was whether the Secretary's decisions were supported by substantial evidence.

A petition for rehearing was referred to the court of appeals *en banc*. Judges McCree and Celebrezze voted to rehear but by a vote of 6-2 the full court denied the petition. The original panel entered a six-page order in which it acknowledged a conflict with a recent decision by the United States District Court for the District of Columbia over whether petitioners were entitled to engage in discovery against the Secretary and a former Federal Highway Administrator in challenging the decisions under sections 1653(f) and 138. The court denied petitioners' application for stay pending a petition for a writ of certiorari. Judge Celebrezze dissented. (A. 195-98)

On December 7, 1970 this Court granted certiorari and continued a stay which prevents construction of the highway pending judgment. (A. 199).

SUMMARY OF ARGUMENT

I

Sections 1653(f) and 138 require that before the Secretary of Transportation may approve a highway that affects a public park such as Overton Park, he must determine that there are no "feasible and prudent" alternatives and that the highway "includes all possible planning to minimize harm." The courts below held that the Secretary was not required to make any record of his determinations under those statutes. That holding frustrates any effective judicial review because without such a record a court has no basis on which to determine whether the Secretary made the determinations and, if so, the basis for them. Nor would a court have any basis for ascertaining what standards were used in making the determinations. Errors of law and fact could easily go undetected. Review on the basis of documents prepared solely for litigation is not sufficient because of the incompleteness of such documents, and because, under the decision below, petitioners would be barred from engaging in discovery to impeach the documents.

II

The court below held that *United States v. Morgan*, 313 U.S. 409 (1941), barred any examination of a former Federal Highway Administrator or the Secretary of Transportation to ascertain whether they made the determinations required by sections 1653(f) and 138 and, if so, the basis for those determinations. The court below misapplied *Morgan* because petitioners sought to discover *whether* decisions were made, not, as in *Morgan*, *how* they were made. Furthermore *Morgan* applies where officials act in a quasi-judicial capacity and thus has no application here.

III

The courts below erred in granting summary judgment for respondents on the basis of the affidavits submitted since those affidavits did not constitute the administrative record on which the Secretary acted. The Solicitor General has now conceded that this was error and that a remand is necessary.

IV

The court of appeals held that in challenging the Secretary's actions petitioners were not entitled to a *de novo* hearing and that they were required to prove that the Secretary's actions were arbitrary and capricious. This is contrary to the Administrative Procedure Act which prescribes the "substantial evidence" standard where there is before the court a record of a hearing required by statute. 5 U.S.C. § 706(2)(E). In this case there were statutory hearings with respect to the location and the design of this highway. Furthermore the court below offered no reason why the Secretary's determinations should be upheld if the administrative record on which he acted does not support them with substantial evidence.

V

The courts below erred in granting summary judgment for respondents because there are issues of disputed fact as to whether Secretary Volpe or his predecessors ever made the determinations required by sections 1653(f) and 138 and there are numerous issues of disputed fact relevant to a review of any such determinations.

ARGUMENT

Legislative History

Petitioners submit that the language of 49 U.S.C. (Supp. III) § 1653(f), *as amended*, 49 U.S.C. (Supp. V) § 1653(f) and 23 U.S.C. (Supp. V) § 138 is sufficiently clear that the Court need not resort to their legislative history. *E.g., Caminetti v. United States*, 242 U.S. 470 (1917). However, since those statutes are before this Court for the first time, we have included as an appendix to this Brief a discussion of their legislative history. This is particularly appropriate since the courts below relied on certain passages which, as we show in the appendix, are misleading and do not come from authoritative sources of legislative history. Furthermore the discussion in the appendix shows beyond question that the provisions relied upon by petitioners, found first in 49 U.S.C. (Supp. III) § 1653(f), and now contained in sections 1653(f) and 138, were effective April 1, 1967, over a year before final approval of the location of the route through Overton Park.

I. THE HOLDING OF THE COURTS BELOW THAT THE SECRETARY IS NOT REQUIRED TO MAKE A RECORD OF DETERMINATIONS UNDER SECTIONS 1653(f) AND 138 IS ERRONEOUS BECAUSE EFFECTIVE JUDICIAL REVIEW OF THOSE DETERMINATIONS IS NOT POSSIBLE WITHOUT SUCH A RECORD.

The Secretary of Transportation claims, and petitioners dispute, that he, or his predecessors, determined prior to approving the highway through Overton Park that there were no feasible and prudent alternatives and that the project includes all possible planning to minimize harm to the park. Yet it is undisputed that the Secretary did not make a record of the determinations, nor of any factual findings to support them, nor did he disclose what standards or criteria he used.

The courts below, while holding that sections 1653(f) and 138 require the Secretary to make those determinations, which are subject to judicial review, held that the Secretary is not required to make a record of his determinations. That holding makes any effective judicial review impossible. A court reviewing the Secretary's actions under those statutes must first determine whether the Secretary has made an affirmative inquiry into and considered all the facts relevant to alternative routes and designs. *E.g., Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); *Udall v. FPC*, 387 U.S. 428 (1967). It must then determine whether, before approving the highway, he has in fact made a determination that there are no feasible and prudent alternatives and that the project includes all possible planning to minimize harm to the park. The court must decide whether the standards or criteria applied in making those determinations were the standards required by the statute and finally the court must determine whether the Secretary's determinations are supported by the evidence. A court cannot make such a review if all it has before it is the bare fact that the Secretary approved a highway through a park. That fact reveals nothing about whether the Secretary fully informed himself of all relevant facts; whether he made the determinations required by the statute; what standards he applied; or upon what evidence his determinations were based. The absence of any record of the Secretary's action under these statutes could easily result in a variety of legal and factual errors going undetected. For instance the Secretary's decision may be based on a completely erroneous view of the law (the Secretary may believe the law merely requires "consideration of alternatives") or a completely erroneous view of the facts (the Secretary may believe that the route which goes through the park disrupts or displaces fewer people than an alternative which avoids the park) or the Secretary may have employed erroneous standards

under the statute (he may have based his decision entirely upon the number of people displaced by the various routes and the comparative cost rather than upon considerations of preserving park lands).[12] Without a record of what the Secretary did and the basis for his actions, it would be difficult if not impossible to detect such errors, and with the exception of the most egregious cases where there could be no conceivable basis for the Secretary's determinations, the courts will be forced to accede to the Secretary's "expertise" or his "discretion." This would in effect be no review at all. As this Court said in *B. & O. R. Co. v. Aberdeen & R. R. Co.*, "[t]he requirement for administrative decisions based on substantial evidence and reasoned findings . . . alone makes effective judicial review possible . . . ." 393 U.S. 87, 92 (1968). A number of other cases have emphasized that review of administrative decisions must be made on the basis of an articulated decision by the administrator. It is not sufficient that the court have after-the-fact rationalizations, prepared for litigation by counsel or subordinates, as to what the administrator might have done. The court must have before it a record which discloses what the administrator decided and the basis for his decision. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-43 (1965); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 489 (1942).[13]

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[12] *Compare D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754, 784-87 (D.D.C. 1970), where discovery and trial revealed the Secretary's erroneous interpretation of regulations governing public hearings.

[13] In a particularly persuasive passage the Court said:

> "Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory

There are a number of courts of appeals decisions emphasizing that an adequate record of administrative action is necessary for effective judicial review. In a recent case involving a refusal by the Secretary of Agriculture to act on a petition to suspend uses of DDT, the Court of Appeals for the District of Columbia held that "meaningful appellate review of the refusal to suspend DDT's registration is impossible in the absence of any record of administrative action. . . . Therefore, we must remand the case to the Secretary. . . ." *Environmental Defense Fund v. Hardin*, 428 F.2d 1093, 1099-1100 (D.C. Cir. 1970). *See also, e.g., Greensboro-High Point Air. A. v. CAB*, 231 F.2d 517, 521 (D.C. Cir. 1956); *NLRB v. Capital Transit Co.*, 221 F.2d 864, 867 (D.C. Cir. 1955); *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 23 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951); *First Nat'l Bank v. First Nat'l Bank*, 232 F. Supp. 725 (E.D.N.C. 1964); *aff'd in part sub nom. First Nat'l Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 387-89 (1968); H. M. HART & A. SACKS, THE LEGAL PROCESS, 175 (tent. ed. 1958).

If the Secretary is not required to make a record of his actions under these sections, a reviewing court will have to rely upon affidavits or documents prepared solely for litigation purposes or upon testimony given perhaps many months after the decision was made. Furthermore, under

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process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 144. Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." 315 U.S. at 489.

the court of appeals opinion, those attacking the Secretary's decision would be prevented from discovery or cross-examination to test the reliability and completeness of such documents or testimony. A full and proper judicial inquiry into the administration of these statutes is impossible on the basis of such incomplete documentation.

The hazards of reviewing administrative determinations on the basis of affidavits or memoranda prepared for litigation purposes is sharply illustrated by an incident in *D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754 (D.D.C. 1970). In that case Mr. Swick, the same Mr. Swick who submitted an affidavit here, submitted an affidavit purporting to document the Secretary's determinations under sections 1653(f) and 138. A memorandum attached to his affidavit explained in detail the basis for Secretary Volpe's decisions. At trial, one of the documents considered was that memorandum. In footnote 31, the district court discussed its value. It found that the document was prepared for litigation purposes and that the person who prepared it had no personal knowledge as to what decisions Secretary Volpe had made or the basis for them. He was merely speculating as to what the Secretary might have done. The district court concluded that the memorandum "is of little or no probative value on the question of compliance with § 138 by the Secretary." 316 F. Supp. at 770, fn. 31.[14] Furthermore during the trial in that case an employee of the Department of Transportation suggested that something similar happened with respect to the documents involved in this case.[15]

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[14]The Department of Transportation's lack of forthrightness has been noted in another recent case. *Triangle Improvement Council v. Ritchie*, 429 F.2d 423, 426 (4th Cir. 1970), Sobeloff, J. dissenting from a denial of rehearing *en banc*.

[15]During the trial Mr. Rex Wells, an official of the Bureau of Public Roads who is responsible for processing material relevant to compliance with section 138, testified that he prepared the memorandum referred to above. Wells admitted that although the document purported to explain what the Secretary had done with respect to a deci-

It has come to light in this litigation that the Secretary has now adopted a policy of recording determinations under sections 1653(f) and 138. (Memorandum for the Secretary of Transportation in Opposition, p. 9.) These are apparently contained in written formal memoranda prepared by the Federal Highway Administrator and submitted to the Secretary of Transportation. This administrative interpretation of the Secretary's obligations under these statutes is, we submit, entitled to the weight normally afforded an officer's interpretation of the statutes he is charged with administering, *e.g.*, *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965), and should be followed by this Court in this case.[16]

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sion under section 138, it was prepared some two months after the purported decision and that in fact he, Wells, had no personal knowledge on which to base the memorandum. The court, somewhat incredulous at this procedure, asked Wells:

> "THE COURT: Is this the only time you can recall that it was followed in this case?
>
> "THE WITNESS: Well, there is something similar to this in I-40 in Memphis, but I am not just sure of the sequence of events." *D.C. Federation of Civic Associations v. Volpe*, United States District Court for the District of Columbia, Civil Action No. 2821-69, Transcript of Proceedings, Tuesday, June 9, 1970, p. 277.

[16]The Secretary's voluntary adoption of this policy does not diminish the need for a decision by this Court that such a record is required by statute. The Department of Transportation takes a light view of these internal policies and procedures. A recent amendment to the Department's Regulations states that with respect to policies and procedures promulgated by the Federal Highway Administrator for compliance with provisions of federal law:

> "No such direction, policy, rule, procedure, or interpretation contained in a Federal Highway Administration order or memorandum shall be considered a regulation or create any right or privilege not specifically stated therein." 35 Fed. Reg. 6322 (1970) amending 23 C.F.R., Chap. 1, pt. 1, § 132.

It is likely that the Department will take the same view of the policy to record findings under sections 1653(f) and 138.

II. THIS COURT'S DECISION IN *UNITED STATES v. MORGAN*, 313 U.S. 409 (1941), DOES NOT BAR INQUIRY INTO *WHETHER* AN ADMINISTRATIVE OFFICIAL HAS MADE DECISIONS REQUIRED BY LAW.

The court of appeals held that even though there was no record of any determinations under sections 1653(f) and 138, petitioners were prohibited by *United States v. Morgan*, 313 U.S. 409 (1941), from taking depositions to ascertain whether in fact such determinations had been made and, if so, on what basis. This issue arose because at the time the district court granted summary judgment, petitioners were under a court order not to depose former Federal Highway Administrator Bridwell to ascertain whether he determined that there were no feasible and prudent alternative routes to that through the park. Petitioners noticed the deposition of Bridwell in order to impeach the Swick affidavit filed on behalf of Secretary Volpe. When respondents' motions to dismiss were suddenly converted to motions for summary judgment, petitioners proffered that if they were permitted to depose Mr. Bridwell, he would testify that he did not make the determinations as claimed by Swick. (A. 162) Nevertheless the district court granted summary judgment for respondents and the court of appeals affirmed, relying on *United States v. Morgan, supra.*

The decision below is an unwarranted extension of *Morgan*. In that case the Secretary of Agriculture held a quasi-judicial hearing after which he issued an order establishing a rate schedule. The order was based on elaborate findings. 313 U.S. at 414. At a hearing challenging that order, he appeared as a witness and was questioned about the manner and extent to which he considered the administrative record before making his findings and order. This Court held that it was improper for him to be examined as to the mental processes by which he reached the conclusions in his order. 313 U.S. at 422. In the present case, however, the Secretary of Transportation was not acting in a quasi-judicial capacity as was the Secretary of Agriculture in *Mor-*

gan; nor has he made a written order or written findings as was done in *Morgan.* Petitioners wanted to depose Bridwell in order to make a record that would disclose whether a decision had been made and, if so, the basis for that decision.

Morgan may prohibit examination as to *how* a final decision was reached; but, as a later case established, it does not shield an official from testifying *whether* he made a decision required by law. In *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954), Accardi charged that the Board of Immigration Appeals, in ordering him deported, had prejudged his case on the basis of a list published by the Attorney General naming him as an unsavory character, who should be deported. This Court held that Accardi was entitled to an evidentiary hearing on the question of whether the Board had exercised its own discretion in ordering him deported, or whether it had acted solely because Accardi appeared on the Attorney General's list. The Court said:

> "It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record. . . . Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations." 347 U.S. at 268.

On remand, the district court held a hearing at which all the members of the Board of Immigration Appeals testified as to the influence of the Attorney General's list on their decision. The district court determined that the members had exercised their own discretion; the court of appeals reversed. *United States ex rel. Accardi v. Shaughnessy,* 219 F.2d 77 (2d Cir. 1955). This Court then reversed the court of appeals, holding, over a dissent based on *Morgan,* that the district court had held a proper hearing and had correctly decided that Accardi failed to prove his case. *Shaughnessy v. United States ex rel. Accardi,* 349 U.S. 280 (1955).

A number of other cases make it clear that even where administrative officials have acted in a quasi-judicial manner, *Morgan* does not protect them from interrogation where there is some indication that such discovery would reveal a failure to comply with the law. *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200, 206-08 (4th Cir. 1964); *United Savings Bank v. Saxon*, 209 F. Supp. 319 (D.D.C. 1962); *Virgo Corp. v. Paiewonsky*, 39 F.R.D. 9 (D.V.I. 1966).

In a recent case, precisely on point, the United States District Court for the District of Columbia, *D.C. Federation of Civic Associations, Inc. v. Volpe*, 316 F. Supp. 754 (D.D.C. 1970),[17] faced with the lack of any written determinations under sections 1653(f) and 138, ordered Secretary Volpe to testify whether he made the required determinations with respect to the Three Sisters Bridge project in Washington, D.C. The court said:

> "Since some of these decisions were not committed to writing at the time they were made, it was only by allowing the questioning of the Secretary himself that the Court could ascertain whether the decisions were in fact made and what constituted the basis for the decisions.
>
> * * *
>
> "The interrogation of Secretary Volpe here was limited to the actions which he took, and the materials which he considered as the basis for his determination, rather than his mental process in considering these materials.
>
> "In retrospect, the Court feels that its decision to require the Secretary to testify was a wise one." 316 F. Supp. at 760-61, fn. 12.

[17] Also in at least two other actions against the Secretary of Transportation challenging highway projects, federal officials have appeared as witnesses and testified as to their decisions and the basis for them. *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650, 658 (S.D.N.Y. 1967); *Triangle Improvement Council v. Ritchie*, 314 F. Supp. 20 (D.W.Va. 1969), *aff'd*, 429 F.2d 423 (4th Cir. 1970).

The decision of the district court in *D.C. Federation of Civic Associations, Inc. v. Volpe* was clearly correct, particularly if, as the court of appeals below held, the Secretary is not required to make a record of his determinations under sections 138 and 1653(f).[18] Otherwise the only record on which the court would have to review the Secretary's actions would be affidavits filed on behalf of the Secretary, which petitioners would be barred from attacking through depositions or cross-examination.

In this case there was substantial evidence that Mr. Bridwell would have testified that he did not make the decision required by sections 1653(f) and 138. For instance in his testimony before a congressional committee concerning his activities in the Memphis case, he testified that after outlining several feasible alternatives to the City Council, "we left it completely in the hands of the city council to choose anything they wanted to choose. . . ." (A. 66) The clear implication of this statement is that the City Council, and not the Department of Transportation, made the decision to reject the alternative routes. Secondly, although petitioners had specifically alleged, and supported by affidavit, that no determinations under those statutes had ever been made, Mr. Swick in his affidavit was unable to state positively to the contrary. The most he could say was that Mr. Bridwell and Secretary Boyd had "reaffirmed" a decision made in 1956—some ten years before the applicable statutes had been passed. Third, a Department of Transpor-

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[18] At one point in the pretrial proceedings in *D.C. Federation of Civic Associations, Inc. v. Volpe*, the district court, in order to expedite the trial of that case, refused to permit plaintiffs to take the oral deposition of the Secretary of Transportation. A petition for a writ of mandamus was filed. At the argument, counsel for the government agreed to a continuance of the trial in order that discovery could be completed. The court dismissed the petition saying: "We feel that no definitive action by this Court on this petition need be taken." *D.C. Federation of Civic Associations, Inc. v. Sirica*, No. 24216, (D.C. Cir. May 8, 1970). When the case came on for trial in the district court, that court ordered Secretary Volpe to testify.

tation press release cited in Petition for Certiorari at p. 7, *Individual Members of the San Antonio Conservation Society v. Texas Highway Department, et al.*, No. 1101 O.T. 1970, indicates that the first decision under these statutes was made in September, 1968 in the San Antonio controversy. If that is accurate, it means that no such decision was made with respect to Overton Park in April, 1968 when, according to the Secretary, the final decision on the location was made. And finally the startling material uncovered by the plaintiffs in *D.C. Federation of Civic Associations v. Volpe, supra,* including the facts relevant to this case (*see* fn. 15, *supra*), which is set forth fully in their Brief Amici Curiae in this case, is a further indication of the appropriateness, and indeed the necessity of full discovery in a case such as this.

III. THE COURTS BELOW ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS ON THE BASIS OF THE AFFIDAVITS SUBMITTED BECAUSE THOSE AFFIDAVITS WERE NOT THE ADMINISTRATIVE RECORD ON WHICH RESPONDENTS HAD ACTED AND THAT RECORD WAS NOT BEFORE THE COURTS BELOW.

The third question presented is whether it was proper for the courts below to undertake a review of respondents' determinations and to grant summary judgment for them when respondents failed to submit the administrative record on which they acted but instead submitted only affidavits prepared for this litigation. The Solicitor General has now conceded, on behalf of the Secretary of Transportation, that the courts below should not have granted summary judgment for respondents without having the full administrative record before them (Motion to Remand to the District Court, p. 2). Commissioner Speight, however, disagrees with petitioners and respondent Volpe. His position is, we submit, clearly untenable.[19]

[19] Respondent Speight has argued (Response to Motion to Remand) that the issue of whether any determinations under sections 1653(f)

Respondents have referred in their briefs and their affidavits to a number of studies which, they assert, have explored all alternative routes and designs in considerable detail and which, they say, fully support the Secretary's determinations. It is curious, however, that neither of respondents filed those documents in the district court. Rather than submitting the studies and analyses so that the court might reach its own conclusion as to whether they support the Secretary's actions, respondents submitted affidavits of various officials who participated in the planning process explaining in conclusory terms that they had made certain studies, and asserting that those studies would support the present route and design.[20]

A perusal of the affidavits filed by respondents makes it clear that the underlying documents, not filed below, are highly relevant to any review of the Secretary's actions and that self-serving summaries contained in the affidavits are not adequate substitutes.[21]

and 138 were arbitrary and capricious or were not supported by substantial evidence was not raised by the pleadings. While the complaint does not make any explicit allegation to that effect, we believe it fairly presents the issue. In any event, the issue was clearly raised and considered in the district court proceedings and considered by the court of appeals. Rule 15(b), FED. R. CIV. P. provides in part "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Thus the issue is clearly in this case.

[20]The failure to attach the documents to the affidavits was in direct contravention of Rule 56(e), FED. R. CIV. P., which requires that when affidavits are filed in support of a motion for summary judgment "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

[21]Mr. Luther Keeler, Development Engineer of the Tennessee Highway Department, refers in his affidavit to location studies and reviews "completed between 1957 and 1964"; to the contract "to prepare preliminary and final design plans" for this project; and to additional design reviews and plans prepared by the Bureau of Public Roads. None of those plans or studies was produced. Mr. Rawlings, Regional Right-of-Way Engineer of the Tennessee Department of Highways,

In reviewing an action under the Administrative Procedure Act, 5 U.S.C. § 706, the court is to "review the whole record. . . ." In a case of this nature the "record" includes the record of all actions taken with respect to the project and the information which the Secretary had before him when he made the decisions under review. *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433, 437 (N.D. Calif. 1968); *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650, 662 (S.D.N.Y. 1967). That record is not before this Court and was not before the courts below. The courts below offered no basis for permitting an administrator whose judgments are subject to review under the Administrative Procedure Act to submit in support of a motion for summary judgment not the record on which he acted, but litigation affidavits characterizing those parts of the record which may support his decision.[22] Obviously a court cannot properly perform its reviewing functions on such an incomplete record and, as the Solicitor General now concedes, it was error for the courts below to attempt to do so.

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refers in his affidavit to studies by the Department of Highways of the use of siphons and pumps in connection with the determination of the design of the highway. Those studies were not produced. In a letter to the president of Citizens to Preserve Overton Park, former Secretary of Transportation Alan Boyd stated that he had "asked Mr. Bridwell to develop a number of specific design alternatives in order to minimize damage to the Park and its facilities." (A. 25). Mr. Bridwell then requested that alternate studies be made of lowered grade lines. (A. 137). The results of the studies are not included in this record.

[22] Affidavits such as these, written after the Secretary made the decision under review, are not a part of the "administrative record." *Garvey v. Freeman*, 397 F.2d 600, 610-11 (10th Cir. 1968) and cases cited therein.

IV. THE HOLDING OF THE COURTS BELOW THAT PETITIONERS ARE REQUIRED TO SHOW THAT THE SECRETARY'S DETERMINATIONS UNDER SECTIONS 1653(f) AND 138 ARE ARBITRARY AND CAPRICIOUS IS CONTRARY TO THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT GOVERNING THE SCOPE OF JUDICIAL REVIEW.

The court below held that because petitioners were challenging administrative action, they were not entitled to a *de novo* hearing but, in order to prevail, were required to prove that the Secretary's determinations under sections 1653(f) and 138 were arbitrary and capricious. The court did not elaborate on the meaning of those elusive words in the context of this case, (*cf.* Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55,83 (1965)) nor did it explain how one challenging a decision under sections 1653(f) and 138 could ever meet such a burden where the administrative record was not before the court, where the plaintiffs were not entitled to full discovery, and where there was no record of what decisions were made and the basis for them.

The Secretary's actions are reviewable under the Administrative Procedure Act, 5 U.S.C. (Supp. V) § 706. That statute provides in relevant part:

> "The reviewing court shall . . .
>
> "(2) hold unlawful and set aside agency action, findings, and conclusions found to be . . .
>
> "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
>
> * * *
>
> "(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> "(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

Judge Celebrezze, in dissent, stated, correctly we submit, that the proper standard of review is whether the Secretary's determinations are supported by substantial evidence. The majority's rejection of Judge Celebrezze's position was undoubtedly based, at least in part, on its belief, now conceded by the Solicitor General to be erroneous, that the court could review the Secretary's actions without having before it the administrative record on which he acted. With no such record in evidence, section 706(2)(E), relied upon by Judge Celebrezze, would obviously be inapplicable. However, it is now conceded that in any further proceedings, that record, including transcripts of hearings required by statute and regulations to be held with respect to the location and design of the highway,[23] should be before the court. Section 706(2)(E) would then be applicable, since it governs where there has been a hearing "provided by statute." That section specifically requires the "substantial evidence" standard.

Furthermore, if a reviewing court has before it the administrative record on which the Secretary acted, there is no justification for affirming his determinations under sections 1653(f) and 138 if they are not supported by substantial evidence. This Court said in *Consolo v. FMC*, 383 U.S. 607 (1966) that the substantial evidence test "gives proper respect to the expertise of the administrative tribunal and it helps promote uniform application of the statute." 383 U.S. at 620 (footnote omitted). Those same considerations should apply here. The courts below suggested no reason for recording the Secretary's determinations under sections 1653(f) and 138 any greater weight than is normally afforded an administrator's judgment.[24]

[23] 23 U.S.C. (Supp. V) § 128; 23 C.F.R., Chap. 1, Part I, App. A (1970).

[24] In a similar case, a court, in reviewing the administrative record, equated the arbitrary and capricious test with the substantial evidence test. *See Western Addition Community Organization v. Weaver*, 294 F. Supp. 433, 441, 443 (N.D. Calif. 1968). There is no indication that the courts below intended to equate the two.

As Judge Celebrezze pointed out below, these statutes do not confer broad discretionary authority on the Secretary, but in fact they narrowly limit the situations in which he may approve highways which affect public parks. The courts should scrutinize his actions carefully to insure that he stays within that narrow course charted by Congress. Such scrutiny will be difficult if the Secretary need only show that his actions were not arbitrary or capricious.

If section 706(2)(E) is not applicable to a review of the Secretary's action, then the proper standard is, we submit, whether the decision is "unwarranted by the facts" which would be found after a "trial de novo." 5 U.S.C. (Supp. V) § 706(2)(F).[25] Generally, those attacking an administrative judgment made *ex parte*, who have not had an opportunity to present evidence to the administrator or to challenge opposing evidence are entitled to *de novo* factual determinations, and are entitled to relief if the administrative judgment is "unwarranted by the facts." 706(2)(F). *See, e.g., First Nat'l Bank v. Saxon*, 352 F.2d 267 (4th Cir. 1965); *New Hampshire Fire Ins. Co. v. Murray*, 105 F.2d 212, 217 (7th Cir. 1939); section IV, Brief Amici Curiae of the Committee of 100 of the Federal City in this case. Moreover, the legislative history of the Administrative Procedure Act points out that sections 706(2)(E) and (F) were meant to be correlative; with (E) governing cases where there was an administrative record based on a hearing required by statute and (F) governing all other cases.[26] The Senate Judiciary Committee Report states:

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[25] A decision as to whether review is governed by section 706(2)(E) or (F) could be deferred until after the administrative record has been introduced and the court determines to what extent review could be based on that record or to what extent the lack of any record made a trial of the facts *de novo* necessary. *Compare D.C. Federation of Civic Associations v. Volpe, supra*, at 769.

[26] The arbitrary and capricious test was included as "the minimum requisite under the Constitution." ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong. 2d Sess. 39 (1944-46).

> "The Fifth category [706(2)(E)] necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which the administrative record may be made. The sixth category [706(2)(F)] expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review. . . ."
>
> ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. Doc. No. 248, 79th Cong. 2d Sess. 39 (1944-46). *See also* pp. 279, 370.

Thus if review is not under 706(2)(E), it must be under 706(2)(F) and in either case the decision below adopting the "arbitrary and capricious" standard is erroneous.

V. THE COURTS BELOW ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENTS BECAUSE THERE ARE NUMEROUS DISPUTED ISSUES OF MATERIAL FACT IN THIS RECORD.

In its order denying the petition for rehearing, the court of appeals held that summary judgment was properly granted because "no competent evidence was presented to the district court or to this Court to impeach the affidavit of Mr. Swick." The court held that the affidavit of Arlo I. Smith, who is Chairman of Citizens to Preserve Overton Park and who has followed the activities of the Department of Transportation in this matter as closely as a private citizen can, was not competent because it was based in part on information and belief and contained some conclusory statements. However, the court did not apply the same scrutiny to the Swick affidavit. For instance, Swick relied at least in part on unauthenticated press releases and letters which are hearsay and incompetent to support a summary judgment. *E.g., Union Insurance Soc. of Canton Ltd. v. William Gluckin & Co.*, 353 F.2d 946 (2d Cir. 1965).

Even if the statements in the Smith affidavit which the court of appeals held incompetent are not considered, there

is in the record much competent evidence which contradicts Swick's affidavit and raises genuine issues of disputed fact. For instance, Swick asserted that the route through Overton Park was approved in 1956. We cited above (p. 6) a letter from former Secretary Boyd indicating that no final decision had been reached as late as 1968. Mr. Swick asserts that former Federal Highway Administrator Bridwell reaffirmed a decision that the present route was the only prudent and feasible route. Contradicting that statement is Mr. Bridwell's testimony before the congressional subcommittee that he had told the Memphis City Council "Yes, there are alternatives" and that:

> "We told them that a highway could be built through the area on almost any conceivable line that they could pick, that engineeringly it was feasible." (A. 65)

In the district court petitioners proffered that Mr. Bridwell would testify on deposition that neither he nor any other federal officials made the finding which Mr. Swick asserts he made.

The implication in Mr. Swick's affidavit that a fully depressed route, either completely or partially covered, would not minimize harm to the park is disputed by the statements of the Department of the Interior officials who recommended such designs to lessen the impact upon the park. (A. 46, 50) Furthermore, the implications in his affidavit that a tunnel would create unacceptable safety hazards is disputed by an affidavit documenting the use of tunnels in the interstate system. (A. 78-79) Mr. Swick states in his affidavit that a fully depressed design is "unreasonable," and apparently, therefore, "impossible," because it would require the use of an inverted siphon or pumps to aid drainage of a small creek under the depressed roadbed. Petitioners submitted affidavits of experts which stated that the hazards involved in using the kinds of siphons and pumps required here can be easily overcome and that these pumping devices are used frequently in the interstate high-

way system. (A. 75-77). These are only a few examples of the disputed facts in this record, but they adequately illustrate the error of the courts below in granting and affirming summary judgment.

CONCLUSION

For the foregoing reasons this Court should hold that the Secretary has failed to comply with sections 1653(f) and 138 and should reverse and remand to the district court for it to remand to the Secretary for further proceedings consistent with the Court's opinion. Alternatively the remand could simply instruct the district court to enter an order enjoining construction of the highway until such time as the Secretary makes the required findings and determinations. If the Court should hold that the Secretary is not required to make a record of his determinations under those sections, it should nevertheless reverse the decision below and remand for a trial in the district court, with appropriate pretrial discovery, at which the administrative record could be introduced, and after which petitioners would be entitled to relief if they could prove that the Secretary's actions were not supported by substantial evidence or were unwarranted by the facts. Furthermore, the Court should continue the stay currently in effect until the completion of any further proceedings below.

Respectfully submitted,

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APPENDIX

Legislative History of 49 U.S.C. (Supp. III) § 1653(f) and 23 U.S.C. (Supp. V) § 138

The language of section 4(f) of the Department of Transportation Act, 49 U.S.C. (Supp. III) § 1653(f) (hereinafter section 1653(f)) and section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. (Supp. V) § 138 (hereinafter section 138) is sufficiently precise that these sections may be, and petitioners submit should be, applied without any resort to the legislative history. *E.g., Caminetti v. United States*, 242 U.S. 470 (1917). However, since these statutes have never been before this Court before, we believe a review of their legislative history is appropriate. This discussion is particularly appropriate here because the courts below (1) selected out of context two passages of the 1968 legislative history which give a misleading impression of the Congressional intent and (2) as we point out below, relied not upon authoritative sources of legislative history but rather on post-enactment efforts to limit the scope of these sections.

The predecessors to these statutes were first enacted in 1966. The Federal-Aid Highway Act of 1966, signed by the President on September 13, 1966, provided in part:

> "After July 1, 1968, the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a Federal, State or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use." 23 U.S.C. (Supp. III) § 138; 80 Stat. 771.

This provision, which became section 138 of the Federal-Aid Highway Act, did not become effective until July 1, 1968. Its language varied somewhat from the present language of sections 138 and 1653(f) since, where parks or historic sites were to be used for highways, it required "con-

sideration" of alternatives, but did not explicitly require, as sections 1653(f) and 138 now do, that the Secretary utilize any feasible and prudent alternative.

One month after enactment of the Federal-Aid Highway Act of 1966, Congress passed the Department of Transportation Act. Section 2(b)(2) of the Act stated:

> "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites."

Section 4(f) of that Act, 49 U.S.C. (Supp. III) § 1653(f), 80 Stat. 934, contained the requirements now found in sections 1653(f) and 138; that is, it prohibited the Secretary from approving a highway project affecting a public park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park . . . ."[1]

Section 4(f) was added to the Department of Transportation Act by the Senate Committee on Government Operations which stated in its Report on that Act:

> "This, [section 4(f)] and the policy statement in section 2, are designed *to insure that in planning highways,* railroad rights-of-way, airports and other transportation facilities, *care will be taken, to the*

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[1] The section provided in full:

"The Secretary shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of this Act, the Secretary shall not approve any program or project which requires the use of any land from a public park, recreation area, wildlife and waterfowl refuge or historic site unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge or historic site resulting from such use."

> *maximum extent possible, not to interfere with or disturb established recreational facilities and refuges."* (Emphasis added.) S. REP. No. 1659, 89th Cong., 2d Sess. 6 (1966).

Although the House version of the Department of Transportation Act contained no provision similar to section 4(f), the House and Senate conferees retained 4(f) in the Act without substantial change. *See* STATEMENT ON THE PART OF THE HOUSE MANAGERS ACCOMPANYING CONFERENCE REPORT, H. R. REP. No. 2236, 89th Cong. 2d Sess. 25 (1966).[2] The Department of Transportation Act was signed by the President on October 15, 1966 and became effective April 1, 1967.[3] The language of section 1653(f), the Senate Report, and later discussion on the floor of the Senate, 112 CONG. REC. 26565 (1966), make it absolutely clear that this provision applied to decisions of the Secretary with respect to

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[2]With respect to section 4(f) the Report of the House Managers states:

"In section 4(f) the Senate amendment contained language requiring the Secretary of Transportation to cooperate and consult with the Secretaries of Interior, Housing and Urban Development, and Agriculture and with the States in developing transportation plans and programs that carry out the policy of preserving the natural beauty of the countryside and public park and recreation land, wildlife and waterfowl refuges, and historic sites. The Secretary was prohibited from approving programs or projects requiring the use of any such land unless there is no feasible alternative and all possible planning to minimize harm is taken.

"The conference substitute amendment adopts the Senate amendment language except for adding the words 'and prudent' after the word 'feasible.' "

[3]According to section 15(a), the Act was effective "ninety days after the Secretary first takes office, or on such prior date after enactment of this Act as the President shall prescribe and publish in the Federal Register." By Executive Order 11,340, 32 Fed. Reg. 5453 (1967), the President made April 1, 1967 the effective date of the Act.

highways. Thus, as of April 1, 1967 the Secretary of Transportation was required under 49 U.S.C. (Supp. III) § 1653 (f) not to approve any highway projects affecting parks such as Overton Park unless (1) there were no feasible and prudent alternatives and (2) unless the program includes all possible planning to minimize harm to the park.

A year after the Department of Transportation Act became effective, Congress had before it a series of amendments to the Federal-Aid Highway Act, including proposals designed to harmonize the language of sections 138 and 1653(f). The House Committee on Public Works proposed that section 4(f) be amended to conform to the language of section 138. *See* H. R. No. 17134, 90th Cong., 2d Sess. § 17 (1968). Secretary of Transportation Boyd opposed the proposal to amend section 1653(f). In a letter to Speaker of the House McCormack he said:

> "the Department opposes the proposed amendment at this time—little more than a year after the effective date of section 4(f). The department is aware of no problems which have arisen in the course of administering the present language, nor does the Committee Report refer to any. We think the present language of section 4(f) is a clear statement of the Congressional purpose. Accordingly, there would appear to be no reason to amend it at this time." 114 CONG. REC. 19530 (1968).

The Senate Public Works Committee also considered the proposed amendments to the Federal-Aid Highway Act and recommended no amendments to either sections 138 or 1653(f). On the floor of the Senate, however, Senator Jackson called attention to the House proposal to amend section 1653(f) and proposed an amendment that would conform section 138 to the requirements of section 1653(f). The Senate adopted that amendment. 114 CONG. REC. 19531 (1968).

Although the Senate Public Works Committee Report proposed no amendments to sections 1653(f) or 138, it did

set forth its views as to the requirements of section 1653(f), in its then present form, which had then been in effect for over a year:

> "The committee is firmly committed to the protection of vital park lands, parks, historic sites, and the like. We would emphasize that everything possible should be done to insure their being kept free of damage or destruction by reason of highway construction." S. REP. No. 1340, 90th Cong., 2d Sess. 19 (1968).

The Committee Report then went on to say, in a passage relied on by the court below:

> "The committee would further emphasize that while the areas sought to be protected by section (4)(f) of the Department of Transportation Act [1653(f)] and section 138 of title 23 are important, there are other high priority items which must also be weighed in the balance. The committee is extremely concerned that the highway program be carried out in such a manner as to reduce in all instances the harsh impact on people which results from the dislocation and displacement by reason of highway construction. Therefore, the use of park lands properly protected and with damage minimized by the most sophisticated construction techniques is to be preferred to the movement of large numbers of people." *Ibid.*

Whether or not that statement is inconsistent with the preceding sentence in the Committee Report, it is plainly inconsistent with the statutory language, since an alternative route which avoids a city park will in almost every instance involve dislocation of more homes and businesses than the route which uses the park. In determining the weight to give this Report, it is important to bear in mind that the Senate Public Works Committee was referring to a statute which was originally proposed by the Senate Committee on Government Operations and had been in effect over a year. Thus the Committee Report was not a statement of intent at the time section 1653(f) was passed, nor can it even be

fairly argued that the Committee was interpreting its own prior action. It was rather a post-enactment effort to put a gloss on an effective act which had originated in another committee and has no persuasive significance here. *United States v. Wise*, 370 U.S. 405, 411 (1962).

In the conference to reconcile the House and Senate amendments to sections 1653(f) and 138, the Senate conferees prevailed. The bill reported by the conference and adopted by both Houses made sections 138 and 1653(f) identical and included in both that language previously contained in section 1653(f), which prevents the Secretary from approving a project affecting a park "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."[4] *See* sections 18(a) and (b), Federal-Aid Highway Act of 1968, 82 Stat. 823-24, amending 23 U.S.C. § 138 (Supp. III) and 49 U.S.C. (Supp. III) § 1653(f).

The Conference Report did not discuss these sections. The House Managers, however, appended a statement to the Conference Report. In an apparent effort to regain in

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[4] Sections 1653(f) and 138, as amended in 1968 contain three sentences. The first was verbatim repetition of section 2(b)(2) of the Department of Transportation Act, 49 U.S.C. § 1653(f). The second sentence is what had been the first sentence of 4(f). The third sentence while retaining what was in 4(f) after the word "unless" did amend the third sentence by adding the italicized words set forth below:

" . . . the Secretary shall not approve any program or project which requires the use of any *publicly owned* land from a public park, recreation area, or wildlife and waterfowl refuge of *national, State, or local significance as determined by the Federal, State or local officials having jurisdiction thereof*, or *any land from an* historic site *of national, State, or local significance as so determined by such officials* unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

the legislative history what they had lost in the conference and in the statute itself, the House Managers stated, in a passage relied upon by the courts below:

> "This amendment of both relevant sections of law is intended to make it unmistakably clear that *neither* section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands or that clearly enunciated local preferences should be overruled on the basis of this authority."

Statement of House Managers attached to CONF. COMM. REP. No. 1779, 90th Cong., 2nd Sess. 32 (1968). This statement was neither the statement of the Conference Committee nor the statement of the House, but merely the personal statement of the seven House members who signed it.

When the conference bill came before the Senate, the Senate conferees specifically disclaimed the statement of the House Managers and in particular the passage cited above. They stated that not only was there no such discussion in the conference, but that this statement did not express the intent of the conference committee, did not express the intent of the Senate and was, indeed, contrary to the terms of the statute.

The following colloquy ensued among Senator Randolph (the Chairman of the Public Works Committee and a conferee), Senator Cooper (ranking minority member of the Public Works Committee and a conferee) and Senator Jackson (the originator of the Senate amendment to sections 1653(f) and 138):

> "MR. COOPER. . . .I invite the attention of the Senator from West Virginia to the interpretation given in the report of the managers on the part of the House. *I believe it is wrong, and is contrary to our discussions in the conference.* But most impor-

tant—and I believe this is an interpretation that will hold—it is contrary to the language of the section. There is nothing concerning discretion of the Secretary in the section itself.

"I read from page 32 of the conference report, in the statement of the managers on the part of the House:

" 'This amendment of both relevant sections of law is intended to make it unmistakably clear that neither section constitutes a mandatory prohibition against the use of the enumerated lands, but rather, is a discretionary authority which must be used with both wisdom and reason. The Congress does not believe, for example, that substantial numbers of people should be required to move in order to preserve these lands, or that clearly enunciated local preferences should be overruled on the basic [sic] of this authority.'

"I recall no discussion in the conference of any such intent. Furthermore, the language of the section gives no discretion. If a local official, a State official, or a Federal official having jurisdiction finds one of these areas or sites to be of significance, there is no discretion given to the Secretary of Transportation to permit its use for a highway. Will the Senator agree with me on that?

"MR. RANDOLPH. I agree with what the distinguished Senator from Kentucky has said in referring to the language of the House Manager's on page 32 of the conference report. That, I say with due deference to the House, is the interpretation of the House. It is not our interpretation. I agree with the Senator from Kentucky. This is not as we believe it.

"MR. COOPER. The legislative language, if it is clear on its face, of course, must be interpreted that way. The language prohibits any intrusion upon or invasion of these lands or areas if one of these bodies finds it is of National, State, or local significance,

and the highway cannot be built, unless there is no feasible and prudent alternative to doing so.

"MR. RANDOLPH. I agree with the Senator." 114 CONG. REC. 24033 (1968) (Emphasis added).

The colloquy continued:

"MR. JACKSON. My understanding is, in connection with the amendments that have been made to section 4(f) of the Department of Transportation Act, that even though the local authorities—meaning the State or authorities in a subdivision of the State—should decide the highway would not violate the recreational area or the public park area, the Secretary nevertheless would retain the right to veto the action. Would the Senator from West Virginia, who is the chairman of the committee and the floor manager of the bill, respond to that?

"MR. RANDOLPH. The Senator is correct. That is retained in the Secretary's authority.

"MR. JACKSON. So it is the understanding of the Senate conferees—and I understand it is the position of the ranking minority member of the committee, the able Senator from Kentucky—that that authority is retained under the amended provisions of section 4(f).

"MR. RANDOLPH. Yes; it is retained. The Senator from Kentucky and I agree on that.

"MR. COOPER. This right has not been taken away from the Secretary?

"MR. RANDOLPH. This has not been removed.

"MR. COOPER. That was my understanding in the discussion that occurred in the conference. The Senator from Montana asked the same question.

"MR. JACKSON. I believe it is important that this be clarified.

"MR. RANDOLPH. That is the legislative intent."

Senator Yarborough also entered the dialogue and discussed the San Antonio dispute.

"MR. YARBOROUGH. . . .It was my pleasure to support actively the concerned efforts of the distinguished Senator from Washington [MR. JACKSON] to put section 4(f) into that 1966 act. Before that, I successfully fought to put similar protective language in the Federal-Aid Highway Act of 1966.

"S. 3418, the Senate version of the Federal-Aid Highway Act of 1968, appropriately maintains the authority of the Secretary of Transportation to protect these irreplaceable lands and sites from the cynical intrusions of the insensitive highway lobby.

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"The question has been raised that, if the local authorities said that a site had no historic significance, engineers could ram a highway through regardless of a site's being of historic significance. Is that correct?

"MR. RANDOLPH. No; they could not ram it through, as the Senator has said.

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"MR. YARBOROUGH. I want to give an example of what happened in my own State, and this has been a matter of controversy for 5 years. Brackenridge Park is located along the San Antonio River in San Antonio. It was set out by a veteran of the War Between the States, and comprises 323 acres in the city of San Antonio. . . . It was the first great park in Texas. Texas has no State or national park like it.

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"Now a superhighway is projected to go through it from the north. This is a natural park along the river, and there is not enough open land left over for another park site. Yet, they want to put the highway right through the middle of the park. It has been fought for years. I have no doubt that the city council, which has jurisdiction over this city park, is going to say the park has no historic significance. But do the Federal officials have

authority to withhold the 90-percent Federal share for the highway?

"I want to know if the Federal authorities have a right to protect this park.

"MR. RANDOLPH. Yes; they could withhold funds.

"MR. YARBOROUGH. . . . If you run a highway through a long, slender park of 323 acres you do not have to pay any tax money for right-of-way. Thus the city council, hard pressed for money, is seeking to run a highway right through the center of one of the best parks in the State.

"MR. RANDOLPH. We are not going to allow that.

"MR. YARBOROUGH. This bill will not permit that?

"MR. RANDOLPH. The Senator is correct." 114 CONG. REC. 24036-37 (1968).

This discussion lays to rest any suggestion that the statement of the House Managers represents the Congressional purpose underlying sections 138 and 1653(f).[5] Particularly applicable here are the words of a scholarly analysis of precisely this problem—conflicting House and Senate glosses on the actual conference report:

> "If the final analysis reveals flat disagreement between the two houses there simply is no solution in legislative history. At any rate choosing evidence from one side only cannot be condoned." Note, *Conference Committee Materials in Interpreting Statutes*, 4 STAN. L. REV. 257, 265 (1952).

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[5]This same statement of the House Managers had been held, in view of the above-mentioned comments by the Senate conferees, to be unauthoritative evidence of Congressional intent and to represent only "the personal opinions of those who signed it." *D.C. Federation of Civic Associations, Inc. v. Volpe*, No. 23870, Slip Op. p. 17 n. 38 (D.C. Cir. April 6, 1970).

On the basis of this legislative history, several conclusions are appropriate. First, the statutory requirement that the Secretary not approve the project through Overton Park "unless there are no prudent and feasible alternatives" or unless the project "includes all possible planning to minimize harm" to the park was effective on April 1, 1967. Secondly, the "legislative history" relied on by the courts below was not the legislative history of this requirement, instead isolated selections of 1968 debate over what the statute, then in effect for a year, meant. Surely no post-enactment discussion, particularly by congressmen who opposed the measure or had no role in drafting or proposing it, should prevail over the statutory language. And finally the statutory language is sufficiently clear, as attested by Secretary Boyd's letter and by the statute itself, that no resort to the legislative history is necessary.
